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In the Supreme Court of the United States

OCTOBER TERM, 1985

MELBA JOSEPHINE ARNOUX WOODHOUSE, PETITIONER

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH COURT

MEMORANDUM FOR THE TRIBAL RESPONDENT

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TABLE OF CONTENTS

Page

Cases:

Christensen v. *United States,* 755 F.2d 705, petition for cert. pending, No. 85-372 ..... 3, 4

Mann v. *United States,* 399 F.2d 672 4

Santa Clara Pueblo v. *Martinez,* 436 U.S. 49 ..... 4, 5

United States v. *Mottaz,* cert. granted, No. 85-546 (Nov. 18, 1985) 5

Statutes:

Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, *et seq.* 2

34 Stat. 1035 2

Act of June 30, 1919, ch. 4, 41 Stat. 3, *et seq.* 2

Section 10, 41 Stat. 16-17 2

General Allotment Act of 1887, 25 U.S.C. (& Supp. II) 331, *et seq.* 2

25 U.S.C. (Supp. II) 332 (Section 2) 2

25 U.S.C. 345 ..... 3, 4

28 U.S.C. 1353 3

28 U.S.C. 2401(a) 1, 5

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MEMORANDUM FOR THE TRIBAL RESPONDENT

Petitioner, Melba Josephine Woodhouse Arnoux, an enrolled allotted member of the Blackfeet Tribe of Montana, brought this action to establish title to mineral rights to her allotment which she claims were wrongfully reserved for the Blackfeet Tribe by the Bureau of Indian Affairs. Petitioner claims she was wrongfully denied the mineral estate which allegedly was appurtenant to her allotment. She contends that the court of appeals erred in holding that her suit is barred (1) as against the United States by the six-year statute of limitations in 28 U.S.C. 2401(a), and (2) as against the Blackfeet Tribe of Indians by the immunity of the Blackfeet Tribe from suit.

1. a. Petitioner is an enrolled member of the Blackfeet Tribe of Montana who was born in 1912 on the Blackfeet Indian Reservation. Allotments on the Blackfeet Indian Reservation were first authorized by the Act of March 1, 1907 (34 Stat. 1015, 1035). The Procedures for allotment was to be governed by the provisions of the allotment laws of the United States and the Act of March 1, 1907 (34 Stat. 1015, 1035), which allotment laws included the General Allotment Act of February 8, 1887, 25 U.S.C. (& Supp. II) 331 *et seq.*

Section 332 of that Act provides that Indians shall make selections for themselves and their minor children, and that if anyone eligible for an allotment fails to select one within four years of the start of allotment on that reservation, the Secretary of the Interior *"may direct"* that an allotment be selected for that person.

By the Act of March 1, 1907, ch. 2285, 34 Stat. 1015 *et seq.*, the Commissioner of Indian Affairs was authorized to cause allotments of land on the Blackfeet Indian Reservation to be made "under the provisions of the allotment laws of the United States" (34 Stat. 1035).

Woodhouse was born in 1912, but selection of an allotment was not made for her until 1922. In the intervening time, Congress had passed the Act of June 30, 1919 (Mineral Act), Section 10, 41 Stat. 16-17, which provided that all future Blackfeet allotments contain a reservation of the mineral rights in the allotted land to the Blackfeet Tribe. The patent issued to Woodhouse contains this reservation.

b. In 1983 Woodhouse filed her Complaint in the United States District Court for the District of Montana, Great Falls Division, seeking declarations that she owned the mineral estate underlying her allotted lands since 1922, that she was entitled to a return of the mineral estate, or damages sufficient to cover the lost revenues with interest thereon and the value of the lost mineral estate. Petitioner asserted a right of action under 25 U.S.C. 345, which permits federal courts to determine whether an Indian allottee has been deprived of an allotment or rights connected with an allotment.

The district court held that it had jurisdiction under 25 U.S.C. 345 and the parallel jurisdictional provision in 28 U.S.C. 1353, but it dismissed the amended complaint for failure to state a claim upon which relief could be granted. Pet. App. 10a, 13a-14a. The district court's held that, although the Secretary *was empowered* to have caused an

allotment to be selected for petitioner prior to the enactment of the 1919 statute that reserved the mineral rights to the Tribe, he was not required to do so. The Court of Appeals affirmed on other grounds. The Court of Appeals followed the rational of its prior decision in *Christensen* v. *United States,* 755 F. 2d 705 (9th Cir. 1985), petition for cert. pending, No. 85-372, stating that the district court had no jurisdiction over this suit insofar as it was brought against the United States because the suit is barred by the statute of limitations in 28 U.S.C. 2401(a). The court held that this bar applies to a suit brought by an Indian under 25 U.S.C. 345, citing *Christensen* v. *United States,* 755 F. 2d at 707-708, and *Mann* v. *United States,* 399 F. 2d 672, 673 (9th Cir. 1968). The court reasoned that it has previously rejected the argument that the United States may not invoke a statute of limitations against an Indian because of the special trust relationship between the government and the Indians.

2. a. Petitioner argues (Pet. 14) that the court of appeals erred in holding that the petitioner's suit is barred as against the Blackfeet Tribe of Indians by the immunity of the Tribe from suit. Petitioner asserts that the defense of the doctrine of sovereign immunity can be avoided by virtue of 25 U.S.C. 345. Petitioner argues that this section should be construed as an applied waiver of Tribal immunity. The Ninth Circuit court of Appeals disagreed and recognized that this court has held that a waiver of a tribe's sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 58-59. Tribal respondent submits that the foregoing reasons the issue of tribal sovereign immunity is not a certiorari worthy issue.

Indian Tribes have long been recognized by this court as possessing the common-law immunity from suit. Although this immunity, like other aspects of tribal sovereignty, is subject to the plenary control of Congress, any such waiver must be unequivocally expressed and cannot be implied. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 58-59.

Petitioner relies on 25 U.S.C. 345 being construed as an implied waiver of sovereign immunity. As the Court of Appeals stated this section does not mention Tribes. It provided that "in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant." It is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. at 58-59. Since this act contains no such unequivocal expression, the Court of Appeals correctly ruled that the Blackfeet Tribe is immune from suit.

b. The issue of the six-year statute of limitations in 28 U.S.C. 2401(a) and its applicability to a suit brought by an Indian against the United States under 25 U.S.C. 345 is involved in *United States* v. *Mottaz,* cert. granted, No. 85-546 (Nov. 18, 1985). The Blackfeet Tribe also suggests that the petition for a wit of certiorari in this case be held and disposed of as appropriate in light of the Court's decision in *Mottaz.*

It is therefore respectfully submitted that (i) the petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's decision in *United States* v. *Mottaz,* cert. granted, No. 85-546 (Nov. 18, 1985); and (ii) with respect to the second question presented, the petition for a writ of certiorari should be denied since the Tribe has immunity from suit.

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